

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT BLUEFIELD

CENTER FOR INDIVIDUAL  
FREEDOM, INC.,

Plaintiff,

v.

Civil Action No.: 1:08-cv-00190

NATALIE E. TENNANT, et al.

Defendants,

v.

WEST VIRGINIANS FOR LIFE,  
INC., and ZANE LAWHORN,

Plaintiffs,

v.

Civil Action No.: 1:08-cv-01133

NATALIE E. TENNANT, et al.

Defendants.

**EXHIBIT D IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS'  
SECOND (OR RENEWED) MOTIONS FOR SUMMARY JUDGMENT<sup>1</sup>**

At the recent oral argument on the pending motions for summary judgment, the undersigned counsel indicated that he would ascertain whether the draft forms for reporting independent expenditures previously submitted as an exhibit by the Secretary of State<sup>2</sup> had been finalized and officially adopted. Appended directly hereto is an affidavit authenticating the reporting forms that have since been officially adopted and that are currently in use for reporting independent expenditures. Although not identical to the draft forms, the final forms define the statutory phrase "persons sharing or exercising direction or control" (see W. Va. Code §§ 3-8-2 and 3-8-2b) as the

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<sup>1</sup> Doc. 216.

<sup>2</sup> Exhibit B to Doc. 216.

officers, directors, partners or owners of the reporting entity, just as did the draft forms. This administrative construction removes the alleged “ambiguity” of the quoted phrase, complained of by CFIF.<sup>3</sup> (“In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 495 (1982).)

Respectfully submitted,

NATALIE E. TENNANT, SECRETARY OF STATE OF WEST VIRGINIA and GARY A. COLLIAS, WILLIAM N. RENZELLI, ROBERT RUPP and CINDY SMITH, in their official capacities as members of the West Virginia State Election Commission

By Counsel,

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

/s/ *Silas B. Taylor*

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Office of the Attorney General  
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*Counsel for Natalie E. Tennant, Secretary of  
State of West Virginia, and Gary A. Collias, William N. Renzelli,  
Robert Rupp and Cindy Smith, in their official capacities  
as members of the West Virginia State Election Commission.*

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<sup>3</sup> See, CFIF’s Memorandum in Support of Second Motion for Summary Judgment – Doc. 210 – at 27-28.

**CERTIFICATE OF SERVICE**

I, Silas B. Taylor, Senior Deputy Attorney General, do hereby certify that on the 7<sup>th</sup> day of October 2010, I electronically filed the foregoing "Exhibit C to Defendants' Response to Plaintiffs' Motions for Summary Judgment" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

William C. Porth, Esq.  
Robinson, McElwee  
Post Office Box 1791  
Charleston, West Virginia 25326

Shirley J. Stanton, Esq.  
Stanton Law Firm  
Post Office Box 968  
Fairmont, WV 26555

Thomas W. Kirby, Esq.  
Wiley Rein, LLP  
1776 K Street, NW  
Washington, DC 20006

Joseph L. Jenkins, Esq.  
Preservati Law Offices  
Post Office Box 1431  
Charleston, WV 25325

James Bopp, Jr., Esq.  
Bopp, Coleson & Bostrom  
One South Sixth Street  
Terre Haute, IN 47807-3510

I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

Robbin Stewart  
Post Office Box 29164  
Cumberland, IN 46229-0164

/s/ *Silas B. Taylor*  
Silas B. Taylor  
Senior Deputy Attorney General

Office of the Attorney General  
State Capitol Complex  
Building 1, Room E-26  
Charleston, West Virginia 25305-0220  
Telephone: (304) 558-2021  
Fax: (304) 558-0140  
E-mail: [silastaylor@yahoo.com](mailto:silastaylor@yahoo.com)

**AFFIDAVIT**

State of WEST VIRGINIA,  
County of KANAWHA

Comes now Dave Nichols and after being duly sworn states as follows:

1. I attest and affirm that I am employed as the Manager of Elections in the Secretary of State's Office, have been employed in the Elections Division of said office since January 2009 and am, by reason of that experience, personally knowledgeable of the facts herein.
2. Pursuant to West Virginia Code §3-8-2, the West Virginia Secretary of State has officially approved the attached "State Of West Virginia Independent Expenditure Reporting Form" and "State of West Virginia Electioneering Communications Form".
3. Both forms have been formally adopted by the West Virginia Secretary of State's Office, are required to be used by all persons making reportable independent expenditures and are, accordingly, published on the West Virginia Secretary of State's website.

Further this affiant sayeth not.

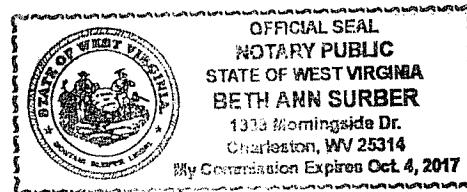


Dave Nichols  
Manager of Elections

SWORN TO AND SUBSCRIBED before me this 16<sup>th</sup> day of FEBRUARY, 2011

Beth Ann Surber

Notary Public in and for the State of  
My Commission Expires: OCTOBER 4, 2017



In Relation to \_\_\_\_\_ Election Year  
(required in addition to regular campaign finance reports)

Name of person making expenditure \_\_\_\_\_

Person(s) sharing or exercising direction or control

"Persons sharing or exercising direction or control" means officers, directors, executive directors or their equivalent, partners, and in the case of unincorporated organizations, owners, of the entity or person making the disbursement for the electioneering communication.

Name \_\_\_\_\_ Email \_\_\_\_\_ Telephone \_\_\_\_\_

Name \_\_\_\_\_ Email \_\_\_\_\_ Telephone \_\_\_\_\_

Name \_\_\_\_\_ Email \_\_\_\_\_ Telephone \_\_\_\_\_

Name of the custodian of the books \_\_\_\_\_

Principal place of business and address (Only if the person making the expenditure is not an individual)

Type of Filing (please choose one):

- \$1,000 single time/aggregate expenditure made within a calendar year
- \$500 or more expenditure for any county office or single-county judicial candidate within 15 days and before 12 hours of an election
- \$1,000 or more expenditure for any statewide, legislative or multi-county judicial candidate within 15 days and before 12 hours of an election
- \$10,000 or more anytime expenditure

**Independent Expenditures**

Refers to: (candidate name) _____
Paid to: _____
Amount of Expenditure: _____
Date Expenditure was Made: _____
Election Cycle: <input type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Special
Refers to: (candidate name) _____
Paid to: _____
Amount of Expenditure: _____
Date Expenditure was Made: _____
Election Cycle: <input type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Special
Refers to: (candidate name) _____
Paid to: _____
Amount of Expenditure: _____
Date Expenditure was Made: _____
Election Cycle: <input type="checkbox"/> Primary <input type="checkbox"/> General <input type="checkbox"/> Special

Add additional pages as necessary

Contributors totaling more than \$250 from the previous calendar year to date  
whose contributions were made for the purpose of furthering the expenditure

(as required by West Virginia Code §3-8-2(b) (1)(E))

Name of Contributor _____	Date the Contributor Exceeded \$250.00 ____ / ____
Address _____	
Occupation of Contributor (if applicable) _____	Employer _____
Employer Address _____	
Value of Contribution _____ Description of Contribution (if other than money) _____	
Is Contributor a PAC registered in West Virginia? _____	
Name of Contributor _____ Date the Contributor Exceeded \$250.00 ____ / ____	
Address _____	
Occupation of Contributor (if applicable) _____	Employer _____
Employer Address _____	
Value of Contribution _____ Description of Contribution (if other than money) _____	
Is contributor a PAC registered in West Virginia? _____	
Name of Contributor _____ Date the Contributor Exceeded \$250.00 ____ / ____	
Address _____	
Occupation of Contributor (if applicable) _____	Employer _____
Employer Address _____	
Value of Contribution _____ Description of Contribution (if other than money) _____	
Is contributor a PAC registered in West Virginia? _____	

**OATH OR AFFIRMATION**

Add additional pages as necessary

I, \_\_\_\_\_, swear or affirm that the attached statement is true and correct, to the best of my knowledge, for all financial transactions occurring within the period covered by this statement. I also swear or affirm that all expenditures listed were made using my own money, and that no money was received by any other individual, candidate, or committee.

Office Use Only

Signature \_\_\_\_\_

Date \_\_\_\_\_, 20\_\_\_\_

This form must be received in the Secretary of State's Office prior to the close of business to be accepted on that date.

## Information on Electioneering Communications

### **What is an Electioneering Communication?**

An "Electioneering Communication" is defined by West Virginia Code §3-8-1a as:

" any paid communication made by broadcast, cable or satellite signal, or published in any newspaper, magazine or other periodical that:

- (i) Refers to a clearly identified candidate for a statewide office or the Legislature;
- (ii) Is publicly disseminated within:
  - (a) Thirty days before a primary election at which the nomination for office sought by the candidate is to be determined; or
  - (b) Sixty days before a general or special election at which the office sought by the candidate is to be filled; and
- (iii) Is targeted to the relevant electorate."

### **Excluded from this definition are:**

(i) A news story, commentary or editorial disseminated through the facilities of any broadcast, cable or satellite television or radio station, newspaper, magazine or other periodical publication not owned or controlled by a political party, political committee or candidate: *Provided*, That a news story disseminated through a medium owned or controlled by a political party, political committee, or candidate is nevertheless exempt if the news is:

(a) A bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility; and

(b) Is part of a general pattern of campaign-related news that gives reasonably equal coverage to all opposing candidates in the circulation, viewing or listening area;

(ii) Activity by a candidate committee, party executive committee or caucus committee, or a political action committee that is required to be reported to the State Election Commission or the Secretary of State as an expenditure pursuant to section five of this article or the rules of the State Election Commission or the Secretary of State promulgated pursuant to such provision: *Provided*, That independent expenditures by a party executive committee or caucus committee or a political action committee required to be reported pursuant to subsection (b), section two of this article are not exempt from the reporting requirements of this section;

(iii) A candidate debate or forum conducted pursuant to rules adopted by the State Election Commission or the Secretary of State or a communication promoting that debate or forum made by or on behalf of its sponsor;

(iv) A communication paid for by any organization operating under Section 501(c)(3) of the Internal Revenue Code of 1986;

(v) A communication made while the Legislature is in session which, incidental to promoting or opposing a specific piece of legislation pending before the Legislature, urges the audience to communicate with a member or members of the Legislature concerning that piece of legislation;

(vi) A statement or depiction by a membership organization, in existence prior to the date on which the individual named or depicted became a candidate, made in a newsletter or other communication distributed only to bona fide members of that organization;

(vii) A communication made solely for the purpose of attracting public attention to a product or service offered for sale by a candidate or by a business owned or operated by a candidate which does not mention an election, the office sought by the candidate or his or her status as a candidate; or

(viii) A communication, such as a voter's guide, which refers to all of the candidates for one or more offices, which contains no appearance of endorsement for or opposition to the nomination or election of any candidate and which is intended as nonpartisan public education focused on issues and voting history.

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**Reporting Requirements for Electioneering Communications**

**When must reports be filed?** (WV Code 3-8-2b)

Once a person or group spends more than \$5,000 in "purchasing, producing, or disseminating electioneering communications" in a calendar year, a report must be filed with the Secretary of State's Office. This report must be filed within 24 hours of incurring the expense that eclipses the expenditure threshold of \$5,000. A separate report must then be filed each time the person or group spends over \$5,000 since the last report filed within that calendar year of filing. If a person spends a total of \$1,000 on or after the fifteenth day but more than 12 hours before the day of any election, a report must be filed within 24 hours of the disclosure date.

**Note:** From this point, the term "person" will be defined as "an individual, partnership, committee, association, and any other organization or group of individuals." as referenced in WV Code §3-8-1a.

**What information must be reported?** (WV Code 3-8-2b)

**Contributors**

For all contributors who have given more than \$1,000 from the first day of the preceding calendar, the following information must be reported:

Names and addresses of the contributors.

The value of the contribution and description of the contribution if it is not money must be reported.

The date that a contributor had given over \$250 in contributions to the person filing the electioneering communication report must also be included for all contributors that have given over \$1,000.

**Expenditures**

**Expenditures of more than \$1,000 must be reported and the information must include:**

The name of the person making the expenditure; the name of any person sharing or exercising direction or control over the activities of the person making the expenditure; and the name of the custodian of the books and accounts of the person making the expenditure;

*"Persons sharing or exercising control" means officers, directors, executive directors or their equivalent, partners, and in the case of unincorporated organizations, owners of the entity or person making the disbursement for the electioneering communication.*

If the person making the expenditure is not an individual, the principal place of business of the partnership, corporation, committee, association, organization or group which made the expenditure;

The elections to which the independent expenditure pertain, the names, if known, of the candidates referred to or to be referred to therein, whether the expenditure is intended to support or oppose the identified candidates and the amount of the total expenditure reported pursuant to paragraph (C) of this subdivision spent to support or oppose each of the identified candidates;

The amount of each expenditure of more than \$1,000 made during the period covered by the statement and the name of the person made during the period covered by the statement and the name of the person to whom the expenditure was made.

**Where are Reports Filed? (WV Code §3-8-2b and §3-8-1a)**

Electioneering Communication reports must be received in the Secretary of State's Office no later than the close of business on the next regular business day of the office after the "disclosure date." The "disclosure date" is defined in WV Code 3-8-1a as either of the following:

(A) The first date during any calendar year on which any electioneering communication is disseminated after the person paying for the communication has spent a total of \$5,000 or more for the direct costs of purchasing, producing or disseminating electioneering communications; or

(B) Any other date during that calendar year after any previous disclosure date on which the person has made additional expenditures totaling \$5,000 or more for the direct costs of purchasing, producing or disseminating electioneering communications.

These reports may be filed in the Secretary of State's Office in person or filed electronically by the means of fax or email. The dates of receipt of the form is the business day in which it is received. If a form is received after the close of business, it will be considered as received on the next business day.

Forms may be hand delivered to:

Office of the Secretary of State  
Natalie E. Tennant, Secretary of State  
State Capitol  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305  
or  
faxed to 304-558-8386  
emailed to [elections@wvsos.com](mailto:elections@wvsos.com)

**\*All electioneering communication forms must be RECEIVED by the close of business to be considered as received on that date.**

For more information on electioneering communications visit [www.wvsos.com](http://www.wvsos.com).

## Electioneering Communications Form

Must be filed when \$5,000 or more is spent on "electioneering communications" as detailed in WV Code §3-8-2b.

Name of person making expenditure \_\_\_\_\_

## Person(s) sharing or exercising direction or control

*"Persons sharing or exercising direction or control" means officers, directors, executive directors or their equivalent, partners, and in the case of unincorporated organizations, owners of the entity or person making the disbursement for the electioneering communication.*

Name \_\_\_\_\_ Email \_\_\_\_\_ Telephone \_\_\_\_\_

Name \_\_\_\_\_ Email \_\_\_\_\_ Telephone \_\_\_\_\_

Name \_\_\_\_\_ Email \_\_\_\_\_ Telephone \_\_\_\_\_

Name of the custodian of the books \_\_\_\_\_

Principal place of business and address (Only if the person making the expenditure is not an individual)

## Electioneering communication expenditures of more than \$1,000 (as required by WV Code §3-8-2b)

Refers to: (candidate name) \_\_\_\_\_

Paid to \_\_\_\_\_

Amount of expenditure \_\_\_\_\_ Date the expenditure was made \_\_\_\_\_

Election year \_\_\_\_\_ Made within (check one):

 30 days prior to the Primary Election 60 days prior to the General Election

Refers to: (candidate name) \_\_\_\_\_

Paid to \_\_\_\_\_

Amount of expenditure \_\_\_\_\_ Date the expenditure was made \_\_\_\_\_

Election year \_\_\_\_\_ Made within (check one):

 30 days prior to the Primary Election 60 days prior to the General Election

Refers to: (candidate name) \_\_\_\_\_

Paid to \_\_\_\_\_

Amount of expenditure \_\_\_\_\_ Date the expenditure was made \_\_\_\_\_

Election year \_\_\_\_\_ Made within (check one):

 30 days prior to the Primary Election 60 days prior to the General Election

Refers to: (candidate name) \_\_\_\_\_

Paid to \_\_\_\_\_

Amount of expenditure \_\_\_\_\_ Date the expenditure was made \_\_\_\_\_

Election year \_\_\_\_\_ Made within (check one):

 30 days prior to the Primary Election 60 days prior to the General Election

Name of contributor \_\_\_\_\_ Date the contributor exceeded \$250 \_\_\_\_\_

Occupation of contributor (if applicable): \_\_\_\_\_

Value of the contribution \_\_\_\_\_ Description of contribution \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State and Zip Code: \_\_\_\_\_

Name of contributor \_\_\_\_\_ Date the contributor exceeded \$250 \_\_\_\_\_

Occupation of contributor (if applicable): \_\_\_\_\_

Value of the contribution \_\_\_\_\_ Description of contribution \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State and Zip Code: \_\_\_\_\_

Name of contributor \_\_\_\_\_ Date the contributor exceeded \$250 \_\_\_\_\_

Occupation of contributor (if applicable): \_\_\_\_\_

Value of the contribution \_\_\_\_\_ Description of contribution \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State and Zip Code: \_\_\_\_\_

Name of contributor \_\_\_\_\_ Date the contributor exceeded \$250 \_\_\_\_\_

Occupation of contributor (if applicable): \_\_\_\_\_

Value of the contribution \_\_\_\_\_ Description of contribution \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State and Zip Code: \_\_\_\_\_

#### OATH/AFFIRMATION

I, \_\_\_\_\_, swear or affirm that the attached statement is true and correct, to the best of my knowledge, for all financial transactions occurring within the period covered by this statement.

Office Use Only

Signature \_\_\_\_\_

Date \_\_\_\_\_, 200\_\_\_\_\_

This form must be received in the Secretary of State's Office prior to the close of business to be accepted on that date.